Supreme Court, U.S.
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No. 10-436

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF

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INTRODUCTION

Commonly Used Acronyms

IEP: The Individualized Education Program means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR 300.320 through 300.324, and that must include certain information including a statement of the child's present levels of academic achievement and functional performance.

IEE: The Independent Educational Evaluation is a guaranteed procedural safeguard for parents that must be considered in any decision made with respect to the provision of FAPE. 34 C.F.R. § 300.502.

LRE: Least Restrictive Environment means "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

As previously briefed, every circuit in this country applies similar factors in a mainstreaming

analysis used to determine whether a child has been provided an education in his/her LRE. This uniform test was not applied in this case as the Fifth Circuit carved out an unprecedented exception to its application for certain preschoolers. In the absence of this safeguard, R.H. and other preschoolers with disabilities are being arbitrarily restricted to special education classrooms, in violation of the Individuals with Disabilities Education Act. Upon review of the Brief in Opposition ("Opposition") submitted by respondent Plano Independent School District ("PISD"), a few misrepresentations of the record emerge which warrant clarification in order for the Court to properly consider R.H.'s Petition for Writ of Certiorari ("Petition").

1. In order to argue that the special education class rather than a mainstream class was the appropriate placement for the 2005-2006 school year, PISD is forced to rely on "needs" set forth in an IEP written when R.H. was 3 years old, an entire year prior to the disputed IEP with the disputed proposed placement which is the subject of this appeal. See the evidence cited by PISD at the top of p. 2 of its Opposition; *see also* R.H.'s Petition for Panel Rehearing to the Fifth Circuit found at Appendix D to Petitioner's Appendix to his Petition for Writ of Certiorari. In fact, the IEP in dispute was never finished or agreed to because of the parents' disagreement over those very needs, as well as R.H.'s placement, and other issues. See p. 87a-89a of the Appendix to the Petition. There is no evidence in the record that R.H. had those same needs or could not be mainstreamed for the relevant 2005-2006 school year. To the contrary, the IEE and his evidenced

success in the mainstream placement proved that R.H. was able to receive a satisfactory education in a mainstream class. Vol. II, page 87; P. Exh. 18-14/15 [Bates 420-421]. The fact that PISD has up to this point successfully relied on an old IEP to restrict R.H.'s later placement highlights the need for a uniform, mandatory mainstreaming analysis. Moreover, PISD should not be permitted to mischaracterize the evidence in order to create a factual dispute used to prevent certiorari from being granted.

2. It is undisputed in the underlying administrative record that PISD's proposed placement for R.H. at Beaty was in a full-time special education classroom for the 2005-2006 year. P. Exh. 14-12 [Bates 333].

3. In its attempt to turn this request for certiorari into a factual debate about R.H.'s unique needs, PISD conveniently remains silent about the undisputed fact that no one has ever made a mainstreaming assessment of R.H. based on the factors recognized by circuits across the country. Without this assessment, it was impossible to fairly determine what his needs and abilities truly were to answer the most fundamental question: can he be mainstreamed? The Fifth Circuit blessed a special education placement without ever asking this crucial question.

4. PISD's misleading focus on whether the lower courts considered a specific placement option – the private preschool TLC, completely ignores the central problem, which is that no one ever investigated other mainstream placement options. It is also important

factually that TLC was rejected because it was a private school; this is not the same as a finding that R.H. could not be mainstreamed. See the bottom of page 77a-78a of the Appendix to the Petition for this crucial distinction quoted in the Fifth Circuit's Opinion. There is no factual dispute that no other mainstream classrooms were investigated as placement options for R.H. PISD's self-serving attempt to re-characterize its full-time special education classroom as a mainstream classroom should not be used to prevent certiorari in this case.

5. PISD's assertion that the lower courts all found that PISD administered the program in the least restrictive environment (p. 4 of Opposition), begs the question of whether this finding is legally justifiable when it contradicts the unavoidable result of commonly applied mainstreaming analyses. The evidence that supports mainstreaming R.H. under the *Daniel R.R.* factors has never been disputed; the reason R.H.'s claim has been unsuccessful is because the factors have never been applied.

6. PISD frequently emphasizes that the placement must be *appropriate*. R.H. agrees. R.H. is asking this Court to require uniform application of the circuits' own analyses to make this determination rather than allowing courts to arbitrarily apply old IEPs, outdated needs and skill sets, while ignoring all independent and current evaluations in the record that support a mainstream placement. Only the uniform application of such a child-centered analysis will ensure equal protection of the law in order to protect a child's right to be mainstreamed to *the*

maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A).

PRIMARY ARGUMENT

In order to evaluate whether R.H.'s contested IEP could be implemented in the LRE, the lower courts should have utilized the mainstreaming factors recognized by circuits across the country and asked whether:

a) the school district took steps to accommodate R.H. in a regular class before assuming he needed a special education class; b) R.H. obtained educational benefit when his IEP was implemented in the regular education classroom; c) R.H. obtained non-academic benefit when his IEP was implemented in the regular education classroom; d) R.H.'s presence in the regular education classroom did not detrimentally affect the other students in the classroom; and e) there were regular preschool class options close to R.H.'s residence.

It is uncontested in PISD's Opposition and in the record that these questions have never been asked with respect to R.H. This failure to apply a mainstreaming analysis is of even greater concern when, as in this case, all of the evidence in the record supports a mainstream placement under every factor of the analysis. Failing to apply this analysis, PISD then made no attempt to provide a mainstream classroom, and this failure has been blessed by the Fifth Circuit.

PISD vaguely states only that "the Fifth Circuit carefully applied the mainstreaming analysis in the full context of determining whether PISD's offered educational program for R.H. provided him with a free *appropriate* public education." Opposition at 15 (emphasis in original). Where is this analysis? How do you legitimately determine what is *appropriate* without this analysis? This analysis must be applied for every child in determining that child's LRE to consistently protect a child's federally recognized right to be mainstreamed to the maximum extent appropriate. It is this essential undisputed fact that PISD and the lower courts failed to apply this safeguard, a mainstream analysis, that provides the basis for granting certiorari in this case.

PISD's attempt to obfuscate this failure by instead discussing misused facts in the record does nothing to eliminate the problematic circuit splits set forth by R.H. in his Petition.

In its Opposition, PISD states that "R.H. cannot dispute that his placement at Beaty provided age-appropriate instruction alongside typically developing peers. R.H.'s petition thus presents a false case for review by assuming TLC, and not Beaty, was the regular educational environment." However, Beaty is precisely the type of preschool placement that is at issue in the circuit split cases relied on by R.H. in his Petition. These cases clearly establish that hybrid preschool classrooms (special education classes with some typically developing peers) are more restrictive than a fully mainstreamed preschool class, which is why they often do not constitute the LRE. After all, as self-

reported by PISD, R.H.'s proposed placement at Beaty was in a full-time special education classroom...this is no "false case" as PISD claims. P. Exh. 14-12 [Bates 333].

While certain circuits have determined that it is not required under the IDEA to seek to maximize a student's potential, there is no such vagueness in the LRE provision. The LRE provision of the IDEA is the only place in the Act where maximization is explicitly required in the statutory definition with the language "to the maximum extent appropriate." "Some" exposure to nondisabled peers in an integrated full-time special education classroom (as defined by PISD itself) cannot satisfy this maximization requirement for a child who can receive a satisfactory education in a mainstream class. Providing "some" exposure to typical peers in a special education classroom fails to meet the substantive provision of this requirement for such a child on multiple counts. It fails to maximize 1) the extent of exposure to nondisabled peers 2) in the regular class and 3) access to the general curriculum. The courts must rely on the statutory language for guidance on decisions. The Supreme Court has directed courts interpreting the IDEA to start with the text of the statute and has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). The Court has also stated that "[w]hen the statutory 'language is plain, the sole

function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)); accord *Newby v. Enron Corp.*, 338 F.3d 467, 473 (5th Cir.2003) (noting that the plain language of a statute governs when it is "clear on its face").

Finally, PISD has attempted to confuse the issue throughout this litigation by arguing that this is a case of private v. public placement. However, the parents were not requesting private school, but rather a mainstream placement.[1] Thus, PISD's first "Question Presented" to the Court completely mischaracterizes the relief that R.H. is seeking – no private preschool mandate is required or requested.

OTHER ISSUES RAISED BY PISD

1. Spending Clause

PISD again wrongly claims that R.H. is asking the Court to define private schools as the "regular educational environment" for preschool children, thus requiring public school districts to place

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[1] See PISD's notice of refusals at P. Exh. 11-1 [Bates 279] (parents requested natural ratio of typically developing peers to students with an IEP); P. Exh. 15-3 [Bates 347] (parents requested high volume of peers); P. Exh 5-2 [Bates 279] ("it is our desire for Beaty to be able to provide the changes to his IEP that R.H. currently needs..."). A request for private placement at TLC is denied for the first time in January 2006 after five months of the parents' attempted collaboration with PISD to provide a mainstream option. See P. Exh. 19-4 [Bates 427].

preschool children in private schools. This is an absurd characterization of the relief R.H. is in fact requesting: that the courts be required to consistently and uniformly apply their own mainstreaming analyses and if it is determined that a child can be mainstreamed, to investigate preschool mainstream options available. This can be Head Start, Early Learning Centers, private preschools, kindergarten, etc. School districts have plenty of available mainstreaming options for preschoolers to choose between. However, if they are to receive the financial benefit of federal funding for complying with the IDEA, then they need to choose options that comply with the IDEA, including the mainstreaming mandate. While "there is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA...public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993).

2. Appropriateness of TLC

Even if TLC was not appropriate, this does not relieve PISD and the courts of the responsibility to determine whether R.H. could be mainstreamed and whether there were any appropriate mainstream placements available. However, contrary to PISD's

assertion, the appropriateness of TLC was expressly avoided by the lower courts and has never been made. The Hearing Officer never made this determination because, as she stated, if she "finds that the District's proposed program is appropriate, it is not necessary to reach the appropriateness of the private school placement." Amended Decision of Hearing Officer at p. 11 (Bates 0049). Similarly, the District Court stated it "need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE." Record on Appeal 702-703. This is not a hypothetical case – R.H. remained in a mainstream class at TLC with occupational and speech therapy funded by his parents until he entered kindergarten and thrived there. R.H. has since been officially dismissed from special education by PISD and continues to be successfully educated in a mainstream third grade classroom at his local public elementary school. PISD should not be permitted to invent factual and legal conclusions for the sake of avoiding certiorari. Under *School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985), the appropriateness of TLC indeed would need to be evaluated before determining whether R.H. is entitled to reimbursement. However, this determination never having been made, it is not the issue that has gone up on appeal and this inquiry does not inform nor affect the questions presented to the Court by R.H. in his Petition. Whether the school district violated the IDEA by failing to provide a LRE is a wholly separate issue than whether R.H. is entitled to reimbursement.

3. Dual Enrollment

Although PISD argued to the lower courts that its offer of limited dual enrollment satisfied its LRE obligation, no lower court discussed this issue, and dual enrollment was not part of the basis of any underlying decision that PISD met its LRE obligation. Thus, whether or not limited dual enrollment satisfies PISD's LRE obligation is not part of the present appeal, nor can it be. This issue does nothing to inform nor affect the questions presented to the Court by R.H. in his Petition.

4. Notice Requirement

The Fifth Circuit affirmed the hearing officer's ruling that the notice requirement bars R.H. from relief for the summer of 2005. No one has alleged or found that R.H. is barred from reimbursement for the 2005-2006 school year and beyond. See Amended Decision of Hearing Officer at 11 (Bates 0049) ("Petitioner also requests reimbursement for costs incurred from the fall, 2005 through the present about which he provided notice to the District..."). This is another straw dog presented by PISD to further confuse the issue.

CONCLUSION

PISD quotes Congress at p. 25 of its Opposition, explaining that the intent of the IDEA was to rectify the fact that prior to the Act "a lack of adequate resources within the public school system forced families to find services *outside* the public school

system." (citation omitted) (emphasis added by PISD). What PISD fails to recognize is that is precisely what is still happening to preschoolers like R.H. When the school districts fail to apply a mainstreaming analysis and instead arbitrarily place preschoolers with disabilities into full-time special education classrooms, parents are forced to remove their child from the public school system and place their child in a private preschool in order to access a mainstream setting. This is exactly what the IDEA intended to prevent. We would never permit this for a school-age child; and under the clear language of the IDEA, a preschooler's protection is no less. 34 C. F. R. § 300.116(a). The lower court opinions are all completely devoid of any discussion of the *Daniel R.R.* factors (the version of the mainstreaming analysis used by the Fifth Circuit) and are therefore devoid of any discussion of alternative mainstream preschool placement options. This is unacceptable and contrary to preschool LRE cases in other circuits. For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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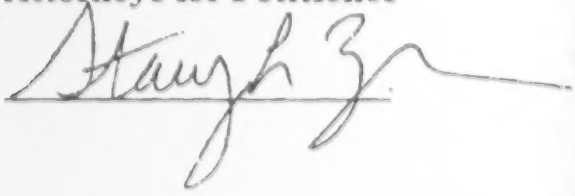

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